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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 484

**HELEN C. POFF, AS EXECUTRIX OF THE LAST
WILL AND TESTAMENT OF JOHN B. WELSHANS,
DECEASED, PETITIONER,**

vs.

THE PENNSYLVANIA RAILROAD COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED OCTOBER 4, 1945.

CERTIORARI GRANTED NOVEMBER 13, 1945.

SUPREME COURT OF THE UNITED STATES

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[fol.1]

**IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

HELEN C. POFF, as Executrix of the Last Will and Testament of John B. Welshans, Deceased, Plaintiff-Appellee,

against

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant

STATEMENT UNDER RULE 13

This action was commenced in the United States District Court for the Eastern District of New York by the filing of the complaint on December 21, 1943, and the service of the summons and complaint on defendant on December 22, 1943. An amended complaint was filed on January 27, 1944. Defendant's answer was filed on February 4, 1944. The complaint was further amended on the trial and the second cause of action therein alleged was withdrawn.

The case came on for trial before Hon. Clarence G. Galston, District Judge, and a jury, on November 14-15, 1944, and resulted in a verdict for the plaintiff in the sum of \$8,500. The Court, on November 29, 1944, filed its opinion denying defendant's motions to set aside the verdict and dismiss the complaint or direct a verdict for defendant.

Judgment in the amount of \$8,575.63 was entered on December 6, 1944.

Defendant filed its notice of appeal to the United States Circuit Court of Appeals for the Second Circuit on March 6, 1945.

Plaintiff's attorney is William J. Carey, 141 Broadway, New York City, Morris A. Wainger, of counsel.

[fol.2] Defendant's attorneys are Burlingham, Veeder, Clark & Hupper, 27 William Street, New York City.

There has been no change of attorneys since the commencement of this action, nor has there been any change of parties, except that this suit was instituted by Helen C. Poff, as executrix of the Last Will and Testament of John B. Welshans, deceased, probated in Allegheny County, Pennsylvania, and prior to the trial, ancillary letters testamentary

upon the Estate of John B. Welshans were issued by the Surrogate's Court of the County of Kings, State of New York, to said Helen C. Poff, and she qualified as such ancillary executrix and the complaint was amended to state said fact.

[fol. 3] IN DISTRICT COURT OF THE UNITED STATES, EASTERN
DISTRICT OF NEW YORK

Civil Action No. 3555

Jury Trial Demanded by Plaintiff

HELEN C. POFF, as Executrix of the Last Will and Testament of John B. Welshans, Deceased, Plaintiff,
against

THE PENNSYLVANIA RAILROAD COMPANY, Defendant

AMENDED COMPLAINT—Filed January 27, 1944

The plaintiff above named, by William J. Carey, her attorney, for her amended complaint, alleges:

For a First Cause of Action:

1. That this action is brought by plaintiff under the provisions of the Federal 'Employers' Liability Act and its amendments,
2. That at the time of the commencement of this action the defendant is doing business as an interstate carrier by railroad within the jurisdiction of this Court.
3. That at all the times hereinafter mentioned the defendant was and still is a corporation of the State of Pennsylvania and was and still is engaged in the business [fol. 4] of a common carrier by railroad and as such carrying on interstate commerce by railroad between the State of New York, Pennsylvania and other States.
4. That on the 10th day of September, 1943, one John B. Welshans was working for the defendant as a locomotive engineer.
5. That on said day he was engineer on a steam engine of defendant, designated as engine No. 6423, which engine,

at the time of the accident hereinafter mentioned was hauling a train of the defendant consisting of several freight cars, proceeding in an easterly direction on the main line of defendant, the said main line at the place of said accident, consisting of four tracks, all maintained, owned and used by the defendant, and going through or near a locality known as Kittaning Point, near Altoona, Pennsylvania.

6. That at about 6:30 A. M. of said day, in the vicinity of said Kittaning Point, the engine of said train upon which said Welshans worked as an engineer, derailed and left its tracks together with several cars of said train, and said engine upset and went down an embankment next to the track upon which it was proceeding.

7. That in the derailment of said engine and cars said John B. Welshans sustained injuries which caused his death then and there.

8. That at the time of said accident three trains of the defendant were involved in the accident and a part of each derailed, each of which trains at the time were proceeding on different tracks.

[fol. 5] 9. That the said Welshans was killed as aforesaid without any negligence on his part.

10. That the derailment of the three trains above mentioned was not caused by any negligence on the part of the said Welshans.

11. That the derailments of said trains was due to the negligence of the defendant and its employees.

12. That the train upon which said Welshans was working at the time of said accident was interstate in character.

13. That at the time of said accident said Welshans was doing work for defendant which was likewise interstate in character.

14. That at the time of his death as aforesaid the said Welshans left no wife, no children or grandchildren and no parents but left surviving him two sisters and a nephew, the son of a deceased brother, none of whom was dependent upon deceased, and this plaintiff, his first cousin, who was entirely dependent upon him, and who by reason of his death as

aforesaid has lost his support and maintenance and has been damaged in the sum of Twenty-five thousand dollars.

15. That before the commencement of this action this plaintiff has been appointed the legal and personal representative of the deceased as Executrix of his Last Will, by the Register of Wills in and for the County of Allegheny, Pennsylvania, in which county the deceased resided at the time of his death, and she duly qualified as such and is now acting as such. That on or about June 28, 1944, ancillary letters testamentary upon the estate of said John B. [fol. 6] Welshans, Deceased, were duly issued by the Surrogate's Court of the County of Kings, State of New York, to Helen C. Poff, the plaintiff herein, and she has duly qualified as, and now is, Ancillary Executrix of the Estate of said John B. Welshans, Deceased, by virtue of said ancillary letters testamentary.

Wherefore, plaintiff demands judgment against the defendant for the sum of Twenty-five thousand dollars and costs.

William J. Carey, Attorney for Plaintiff, 141 Broadway, Borough of Manhattan, City of New York.

[fol. 7] IN DISTRICT COURT OF THE UNITED STATES

ANSWER—Filed February 4, 1944

For its answer to plaintiff's amended complaint defendant

First Defense to First Cause of Action:

1. Admits the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 12 and 13 of the complaint; denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 10 and 15 of the complaint and denies the allegations contained in paragraphs 9, 11 and 14 of the complaint except that it denies that it has any knowledge or information sufficient to form a belief as to relatives who survived the deceased.

First Defense to Second Cause of Action:

2. Answering the allegations of paragraphs 1 to 13 inclusive and 15 of the amended complaint as pleaded in paragraph 16 of the amended complaint, it pleads the al-

legations contained in paragraph 1 of this answer as though replicated at length and denies the allegations contained in paragraph 17 of the amended complaint.

Second Defense to First and Second Cause of Action:

3. Alleges that the death of plaintiff's testator was caused solely by the negligence of said testator.

[fol. 8] **Third Defense to First and Second causes of action:**

4. Alleges that the death of plaintiff's testator was contributed to by the negligence of said testator.

Fourth Defense to First and Second Causes of Action:

5. Alleges that plaintiff is an executrix appointed by the Register of Wills of Allegheny County, Pennsylvania by reason of which she may not institute and maintain this action.

Wherefore, defendant demands judgment that the amended complaint herein be dismissed with costs.

Burlingham, Veeder, Clark & Hupper, by George H. Emerson, A member of the firm. Attorneys for Defendant, 27 William Street, New York City.

[fol. 9] **IN DISTRICT COURT OF THE UNITED STATES**

AGREED STATEMENT OF THE CASE—April 13, 1945

Pursuant to Rule 76, Federal Rules of Civil Procedure, the parties have agreed upon this Statement of the Case, which sets forth such facts averred and proved as are essential to a decision by the appellate court of the question herein involved, and which shall constitute the record on appeal.

The only point which appellant will urge on this appeal is that plaintiff, Helen C. Poff, is not "the next of kin dependent upon" the decedent John B. Welshans within the meaning of the Federal Employers' Liability Act, and that this suit is not maintainable for her sole benefit, inasmuch as Welshans left nearer relatives surviving him.

On September 10, 1943, John B. Welshans, a resident of Pennsylvania and an employee of the defendant, was killed in a railway accident in Pennsylvania while engaged in

interstate commerce within the meaning of the Federal Employers' Liability Act. It was conceded at the trial that the accident was due to negligence chargeable to the defendant.

Welshans left no widow, children or parents surviving him. His nearest surviving relatives were two sisters, Mrs. Harry Spitz and Miss Edna Welshans, and a nephew (a son of Welshans' deceased brother), none of whom was in any way dependent upon the deceased.

[fol. 10] Helen C. Poff, a resident of Pennsylvania, was a cousin of Welshans, being the daughter of Welshans' mother's brother. She was named as executrix under Welshans' last will and testament, which was duly probated in Allegheny County, Pennsylvania.

The evidence with respect to the dependency of said Helen C. Poff upon Welshans was correctly summarized by the Trial Court in his charge as follows:

" . . . it appears that Welshans was living with his mother in his home in Pennsylvania up to the time of the mother's death in March of 1937, and then, following the mother's death, in January of 1938 Mrs. Poff and her husband at the decedent's request came to live at his house, and at first Mr. and Mrs. Poff contributed \$75 a month to the upkeep of the house. Then the husband of Mrs. Poff died some two and a half months after they moved in. She had brought with her some of her furniture, and that was installed in the Welshans home. She also had a car. After the husband's death the \$75 a month, which was her contribution and that of her husband prior to his death, ceased, and she received from Welshans \$40 or \$50 a month for her personal expenses, and in addition a monthly allowance for the upkeep of the house. By upkeep I do not mean to include taxes and repairs. They were covered by Welshans directly. There came a time when Welshans' brother died, and then the amount paid by Welshans was reduced from \$175 a month to \$120 or \$130 a month for food and maintenance. The monthly allowance to her for her personal use was however continued in the sum of \$40 or \$50 a month.

[fol. 11] The theory of the plaintiff is that on those facts you cannot conclude that she was a mere house-keeper, but that she was a dependent living there with no other source of income and receiving money for her

personal use, and money with which to buy food and maintain herself and Welshans up to the time of his death."

Under the Court's charge, the jury must have found that Helen C. Poff was dependent upon Welshans—appellant does not contest that finding on this appeal.

During the trial, at the end of the plaintiff's case and at the end of the entire case, defendant made the following motions:

Motion at end of plaintiff's case.

"Mr. Merritt: If it please the Court, I move to dismiss the complaint upon the grounds that the plaintiff has failed to prove the allegations of the complaint relative to the issues that have been presented, namely, the fact that she is a next of kin within the meaning of the law of the State of Pennsylvania.

The Court: I will reserve decision on the motion."

Motion at end of entire case.

"Mr. Merritt: If the Court please, the defendant renews the motions made at the end of the plaintiff's case, and also moves for a directed verdict on the same grounds.

The Court: I will reserve decision on those motions."

The trial court reserved decision on this question of law, submitted the case to the jury, and when, following rendition of the verdict, the same point was urged by defendant's motion to set aside the verdict and to dismiss the complaint or direct a verdict for defendant, the Court took the motions under advisement. Subsequently, the Court denied defendant's motions.

Attached hereto, and made a part of this statement, are a copy of the judgment appealed from and a copy of the notice of appeal with its filing date; also a copy of the Court's opinion on the denial of defendant's motions.

Dated, April 13, 1945.

Burlingham, Veeder, Clark & Hupper, Attorneys
for Defendant-Appellant. William J. Carey, At-
torney for Plaintiff-Appellee.

Approved. —

Dated: April 13, 1945.

Robert A. Inch, U. S. D. J.

[fol.13] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

OPINION—Filed November 29, 1944

GALSTON, D. J.:

The matter for decision is a motion made by the defendant to set aside the verdict rendered by the jury for the plaintiff in the sum of \$8,500. on the ground that Helen C. Poff is not authorized to maintain an action for her own benefit in circumstances which show that there are nearer surviving relatives of the deceased.

The action is under the Federal Employers Liability Act, Title 45, U. S. C., Secs. 51-60. The decedent died as a result of injuries which he sustained in defendant's employ as a railroad engineer. At the trial, defendants admitted liability for the collision and derailment which caused the death of the decedent. The decedent was unmarried. The only relatives surviving him, other than the plaintiff, were two sisters and a nephew, the latter a son of a deceased brother. Neither the sisters nor the nephew was dependent upon the decedent. Evidence at the trial disclosed that the plaintiff was a first cousin of the decedent and was dependent upon him for support; that he was supporting her at the time of his death and had supported her for about five and a half years immediately prior to his death. The plaintiff, a widow, took care of the decedent's household, which at the time of his death consisted only of the decedent and herself. He gave her \$40. to \$50. a month for her own use, for clothing, medical expenses and other incidentals, and [fol. 14] paid all household bills for food for both of them in the sum of about \$120. a month. He also paid the taxes, repairs of the house which he owned, and other incidentals.

The relevant portion of Title 45, U. S. C., Sec. 51, provides that when an injury is sustained by a railroad employee through the negligence of the employer while engaged in interstate commerce, resulting in his death, the carrier shall be liable

"to his or her personal representatives, for the benefit of the surviving widow, her husband, and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee * *".

The jury, under the charge of the court, by its verdict, must have concluded that Helen Poff was the next of kin dependent upon the deceased.

It is the position of the defendant that the plaintiff was not such next of kin as is contemplated by the statute.

As a matter of first impression and original interpretation of the statute in question, so far as it relates to this matter, a reasonable interpretation would seem to warrant the conclusion that the statute in terms intended as beneficiaries persons other than the widow, husband, children and parents if none there were, so as to create a beneficial interest in such of the next of kin as survive, providing such surviving next of kin are dependent upon the employee. It cannot be gainsaid that a cousin falls within the class "kin,"—a blood relative. Certainly it may be conceded that a brother, sister, nephew and niece would be closer of kin than a cousin, but if such surviving next of kin were not dependent upon the decedent, then they could not fall under the statute, within the class to be benefited, and the next class should take.

Defendant cites *Seaboard Air Line v. Kenney, Administrator*, 240 U. S. 489, but that case is not helpful, for the question there presented was whether an illegitimate child is kin or next of kin of his parents, or of the legitimate children of his parents. Here there is no question that a cousin is not kin. Nor do defendant's citations of *Lindgren v. United States*, 281 U. S. 38; or *Bailey v. Baltimore Mail S. S. Co.*, 43 Fed. Supp. 243; *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367; *C. B. & Q. R. Co. v. Wells-Dickey Trust Co.*, 275 U. S. 161; or *Moffett v. Baltimore & Ohio*, 220 Fed. 39, sustain defendant's proposition.

If any aid is to be obtained from precedents, *Gulf, Colorado & Santa Fe RR. Co. v. Mary J. McGinnis, Administratrix*, 228 U. S. 173 is closest. The action was brought by an administratrix in a State Court of Texas under the Federal Employers Liability Act to recover damages for the negligent death of the decedent while in the employ of the railroad company. The decedent left a widow and four children and the suit was brought for their benefit. Of the surviving children, one was a married woman, residing with and maintained by her husband. There was neither allegation nor evidence that she was in any way dependent

upon the decedent. The jury returned a verdict and apportioned it one-half to the widow and the remainder equally among the four children, including the married and non-dependent daughter. The Supreme Court criticized the State Court in holding that the federal statute authorized the suit to be brought for the surviving wife and children, [fol. 16] "irrespective of whether they were dependent upon him or had the right to expect any pecuniary assistance from him." Justice Lurton's opinion continues:

"In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, ante 417, 33 Sup. Ct. Rep. 192; *American R. Co. v. Didricksen*, 227 U. S. 145, ante, 456, 33 Sup. Ct. Rep. 224."

In the case at bar the plaintiff was shown to have sustained a pecuniary loss. Since, therefore, there is no authority for holding that the next of kin dependent upon such employee is to be excluded because there is a nearer non-dependent relative surviving, the motion to set aside the verdict of the jury is denied.

Clarence G. Galston, U. S. D. J.

[fol. 17] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

JUDGMENT—Entered December 6, 1944

The above entitled action having been regularly called for trial before Honorable Clarence G. Galston, District Judge, and a jury at a term of this Court on November 14 and 15, 1944 and the parties having appeared by counsel and the issues herein having been duly tried and heard upon

the testimony and proofs submitted on behalf of the respective parties and the jury having rendered a verdict in favor of the plaintiff and against the defendant in the sum of \$8,500; and the defendant having moved the Court to set aside said verdict and for a directed verdict in favor of the defendant or in the alternative for a new trial; and the Court after due deliberation having rendered and filed its opinion on November 29, 1944, denying defendant's said motions; and the costs and disbursements of plaintiff having been taxed upon notice in the sum of \$47.30; now it is by the Court

Adjudged and Decreed that the plaintiff, Helen C. Poff, as executrix of the Last Will and Testament of John B. Welshans, deceased, recover of and from the defendant, The Pennsylvania Railroad Company, having an office at 380 Seventh Avenue in the Borough of Manhattan, City of New York, the sum of \$8,500, the amount of the verdict as rendered by the jury together with the sum of \$28.32, interest thereon from November 15, 1944, together with the [fol. 18] further sum of \$47.30, her costs and disbursements as taxed by the Clerk, amounting in all to \$8,575.63, and that said plaintiff have execution against said defendant therefor.

Dated: Brooklyn, N. Y., December 6, 1944.

Percy G. B. Gilkes, Clerk, by Sidney R. Feuer, Deputy Clerk.

(Filing date—December 6, 1944.)

[fol. 19] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

NOTICE OF APPEAL—March 5, 1945

SIR:

Please Take Notice that the defendant, The Pennsylvania Railroad Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the judgment in the sum of \$8,575.63 in favor of the plaintiff and against the defendant, entered herein in the office of the

Clerk of this Court on December 6, 1944, and from each and every part of said judgment, as well as from the whole thereof.

Dated, New York, N. Y., March 5, 1945.

Yours, etc., Burlingham, Veeder, Clark & Hupper,
Attorneys for Defendant, Office and Post Office
Address, 27 William Street, Borough of Manhattan,
City of New York.

To: William J. Carey, Esq., Attorney for Plaintiff, 141
Broadway, New York City.

[Filing date—March 6, 1945.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO CONTENTS OF RECORD—April 13, 1945

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties to the above entitled action that the record on appeal herein shall consist of the following:

Statement Under Rule 13
Amended complaint
Answer
Agreed statement of the case
Opinion of Galston, *D. J.*
Judgment
Notice on appeal

[fol. 21] Stipulation as to the record and Clerk's certificate

Dated, New York, N. Y., April 13, 1945.

Burlingham, Veeder, Clark & Hupper, Attorneys
for Defendant-Appellant; William J. Carey, Attorney
for Plaintiff-Appellee.

[fol. 22] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CORRECTNESS OF RECORD—April 13, 1945

It Is Hereby Stipulated and Agreed that the foregoing is the record as agreed upon by the parties by their respective attorneys.

Dated, New York, N. Y., April 13, 1945.

Burlingham, Veeder, Clark & Hupper, Attorneys
for Defendant-Appellant; William J. Carey, Attor-
ney for Plaintiff-Appellee.

[fol. 23] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 24] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1944

No. 351

(Argued June 5, 1945. Decided July 9, 1945)

HELEN C. POFF, as Executrix, Appellee,

v.

PENNSYLVANIA RAILROAD, Appellant.

Before L. Hand, Augustus N. Hand and Frank Circuit
Judges

Appeal by the defendant from a judgment for the plaintiff in an action brought under the Federal Employers Liability Act, for the death of the plaintiff's testator through the defendant's negligence.

Ray Rood Allen, for the Appellant. Morris A. Wainger, for the appellee.

PER CURIAM:

The defendant appeals from a judgment in favor of the plaintiff in an action brought under the Federal Employers Liability Act. [fol. 25] The plaintiff's testator, a railroad engineer, was killed while engaged in interstate commerce, and the defendant conceded upon the trial that the accident was due to negligence chargeable to it. The deceased left no widow, children, or parents surviving; his nearest surviving relatives were two sisters and a nephew, none of whom was in any way dependent upon him financially. The following are the other relevant facts which the jury may be assumed to have found. The deceased was domiciled in Pennsylvania, as was the plaintiff, who was his cousin; a daughter of his mother's brother. He had lived with his mother until her death in January, 1937, when the plaintiff and her husband, at his request, came to live with him. At first she and her husband paid \$75 a month towards the upkeep of the house; but the husband died shortly after they came to live with him; and thereafter she paid nothing, but received from him \$40 to \$50 a month for her personal expenses, and a monthly allowance for the upkeep of the house. When the decedent's brother died, the amount which he paid for the food and maintenance of the house was somewhat reduced, but he

continued to allow her the same amount for her personal use. She had no other income or money with which to buy food or to maintain herself.

The only point presented on this appeal is whether in the circumstances just stated, plaintiff had any standing to sue under §51, Title 45, U. S. Code, as "next of kin dependent upon such employee." We quote in the margin the relevant words of that section.* The plaintiff argues, and [fol. 26] the judge agreed, that the phrase, "next of kin dependent upon such employee," means the nearest kin who were dependent upon the deceased, and that, in ascertaining who are such, all nearer kin must be disregarded who were not dependent upon him. The defendant argues that the phrase means "next of kin" in the sense of the local statute of distributions, but that of these, those only can recover who suffer some loss by the death and only to the extent of their loss. In the absence of any widow, children or parents, the plaintiff's rule results in going down the line of inheritance as fixed by the statute of distributions, until one comes to the first "dependent," no matter how remote he may be, and how many it has been necessary to pass in order to reach him. (Presumably, if there are more than one of equal degree all will recover to the exclusion of those of remoter degree.)

The plaintiff relies chiefly upon the well-settled law that recovery by any of the persons named in the statute is limited to the pecuniary loss suffered. *Michigan Central R. Co. v. Freeland*, 227 U. S. 59; *Gulf, Colorado and Santa Fe R. Co. v. McGinnis*, 228 U. S. 173. However, the converse by no means follows: i.e. that all who suffer pecuniary loss by the death may recover. So much is certainly not true. No doubt, there would have been an intelligible purpose in so providing but from Lord Campbell's Act forward that has never been the law. The plaintiff cannot, and does not, invoke such a purpose, and must be, and is, content with a

* "Every common carrier by railroad . . . shall be liable for damages to any person suffering injury while he is engaged by such carrier in" (interstate) "commerce, or in the case of the death of such employee to his . . . personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee."

less comprehensive one. She says, following *Notti v. Great Northern Railway*, 110 Mont. 464, that the words should be read as follows: "for the benefit of the surviving widow or husband and children of such employee (sustaining pecuniary loss because of his death) and, if none, then to such employee's parents (if they have sustained pecuniary loss because of his death) and if none, then to the next of kin [fol. 27] dependent upon such employee." The statute sets up a hierarchy of three classes: (1.) the widow and children; (2.) parents; (3.) next of kin. These are mutually exclusive: that is, when there is any recovery in a preferred class there can be none in any deferred class; but we can find no decision but *Notti v. Great Northern Railway, supra*, which holds that, when none of the members of a preferred class have suffered any loss, the members of the deferred class can take. It is possible that *New Orleans and North-eastern Railroad v. Harris*, 247 U. S. 367, 372, did not actually decide the opposite: it may there have been assumed that the widow could have recovered something, in spite of her long disappearance; indeed, that appears to have been decided in *Southern Railway v. Miller*, 267 Fed. Rep. 376, 381 (C. C. A. 4). Perhaps some such assumption was the basis of the decision in *Lytle v. Southern Railway*, 152 So. Car. 161; 171 So. Car. 221, where the court treated a woman who had left the deceased and was living in open adultery, as not his widow. In spite of the fact that she could not in fact have suffered any loss, the court might have supposed that she could recover something, if still a wife. While, therefore, there may be no decision holding the opposite of *Notti v. Great Northern Railway, supra*, the proposition there laid down would be so arbitrary and capricious in application that it cannot be the law. There can be not the least question that the recovery of any amount, however small, by any member of a preferred class is a bar to recovery by all members of deferred classes. *St. Louis & San Francisco R.R. v. Scale*, 229 U. S. 156, 162; *Taylor v. Taylor*, 232 U. S. 363. For instance, in the case of a woman who abandons her home; even though she might recover something, it would be little, and yet it would oust a mother who was absolutely dependent on the deceased; and the same would also be true of a child, who, though independent [fol. 28] pendently wealthy, got something, though little. Similarly of a father, to whom his son gave something, as against a sister who lived with him and depended upon his

support. It seems to us incredible that a statute, which certainly requires such exclusions, excepts cases where the members of the preferred class get nothing, instead of a pittance. On the contrary, we hold that it is the existence of members of preferred classes that bars members of deferred classes, and that the question whether they suffer any loss is irrelevant.

If this be true as between classes, it seems to us plain that an opposite principle should not be introduced in determining recovery among the next of kin themselves. As we have just seen, a widow or children who have suffered only a trifling loss, absolutely exclude parents, however needy; and parents who have suffered only a trifling loss, exclude grandchildren, brothers and sisters. Yet if the plaintiff is right, when there are neither widow, nor children, nor parents, a second or third cousin may recover, although there are intervening grandchildren, brothers, sisters, nephews, nieces, or other closer kin, provided these have suffered no loss by the deceased's death. Congress, which was willing to leave unremedied loss suffered by parents, or grandchildren, who might be totally dependent upon the deceased, could not have meant to recognize remote members of the deceased's other kin, similarly situated. The plaintiff's interpretation does not fulfill any rational purpose; it merely introduces an exception at the precise place where an exception is least to be desired or expected; it mutilates the statute, as much in its purpose as in its language. As in the case of the first two preferred classes, "next of kin" is defined by its hereditary, not by its pecuniary, relation to the deceased; it means the next of kin as the law has always meant it; and dependency is only a selective factor, a condition upon recovery by any members of [fol. 29] that class, as it is among members of the first two classes. The case is not therefore one in which Congress has failed to express its obvious purpose, and in which courts are free to supply the necessary omission; it is a case where—whatever that purpose—it certainly did not include what the plaintiff asserts.

Judgment reversed; complaint dismissed.

[fol. 30] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of July one thousand nine hundred and forty-five.

Present Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

HELEN C. POFF, as Executrix, etc., Plaintiff-Appellee,

v.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant.

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and complaint dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 31] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Helen C. Poff, etc., v. The Pennsylvania Railroad Company. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed July 9, 1945. Alexander M. Bell, Clerk.

[fol. 32] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 29] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 13, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

(1474)

Jurisdiction

The jurisdiction of this Court is invoked under Section 240, subdivision (a), of the Judicial Code, as amended, 28 U. S. C., § 347 (a). The judgment of the Circuit Court of Appeals, entitled Order for Mandate, sought to be reviewed, is dated July 9, 1945 (R. 28). This Decree reversed the judgment of the District Court and dismissed the complaint (R. 28).

Statute Involved

The statute involved is Section 1 of the Federal Employers' Liability Act (45 U. S. C., § 51), which, insofar as material here, provides as follows:

"Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is engaged by such carrier in" (interstate) "commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, * * *".

Summary Statement of the Matter Involved

This is an action at law brought in the United States District Court for the Eastern District of New York by Helen C. Poff, as Executrix of the Last Will and Testament of John B. Welshans, Deceased, the petitioner herein, against The Pennsylvania Railroad Company, the respondent herein, under the Federal Employers' Liability Act (45 U. S. C. §§ 51-60) to recover damages for the death of the deceased, a railroad engineer, who was killed while engaged in interstate commerce under circumstances which

respondent admitted on the trial constituted negligence chargeable to it (R. 9). The trial was before a jury which rendered a verdict for petitioner in the sum of \$8,500, on which judgment for \$8,575.63 was entered in the District Court (R. 17-18). An appeal from said judgment was taken by respondent to the United States Circuit Court of Appeals for the Second Circuit (R. 19), which reversed the judgment of the District Court and dismissed the complaint (R. 27, 28). The judgment of the Circuit Court of Appeals was entered herein on July 9, 1945 (R. 28).

Deceased left him surviving petitioner, his widowed first cousin, who was a member of his household and solely dependent upon him for support; she had received her entire support from him for five and one-half years before his death (R. 10-11). Two sisters and a nephew, a son of a deceased brother, who were in no way dependent upon him, also survived the deceased (R. 9). No widow, children nor parents survived him (R. 9).

The sole question involved on the appeal to the Circuit Court of Appeals was whether the petitioner is entitled to recover under the provision of Section 1 of the Federal Employers' Liability Act (45 U. S. C., § 51), that in case of the death of an employer the carrier shall be liable

"to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee . . ."

The District Court held that since the petitioner was the nearest dependent kin of the deceased, she was entitled to recover under the Act (R. 13-16). *Poff v. Penna. RR. Co.*, 57 Fed. Supp. 625.

The Circuit Court of Appeals decided that petitioner was not entitled to recover under this provision of the Act because nearer relatives survived the deceased, although they were in no way dependent upon him and although petitioner was the nearest surviving dependent relative (R. 24-27).

The Questions Presented

1. Whether the Circuit Court of Appeals properly interpreted Section 1 of the Federal Employers' Liability Act (45 U. S. C. § 51), in holding that petitioner, a first cousin of the deceased, his nearest relative dependent upon him for support, was not entitled to recover under the Act because two sisters and a nephew, the son of a deceased brother, who were nearer relatives than petitioner, also survived him, although they were in no way dependent upon the deceased nor suffered any pecuniary loss by his death.

2. Whether under Section 1 of the Federal Employers' Liability Act the phrase "next of kin dependent upon such employee" means the nearest *dependent* relative who survives a deceased employee, so that such a relative may recover under the Act when there are nearer relatives who were in no way dependent upon the deceased nor sustained any pecuniary loss by his death and who are thereby disqualified as beneficiaries under the Act.

3. Whether under Section 1 of the Federal Employers' Liability Act the phrase "next of kin dependent upon such employee" means that recovery is limited only to the nearest surviving relative, so that if such relative was in no way dependent upon the deceased and suffered no pecuniary loss by his death and is thereby disqualified as a beneficiary, no recovery can be had, and the cause of action lapses, although there is a relative, who was dependent upon the deceased and is his nearest *dependent* kin.

Specification of Errors

The Circuit Court of Appeals erred

1. In holding that petitioner, deceased's first cousin, who was wholly dependent upon him for support, and who was his nearest dependent kin, was not entitled to recover damages for his death under Section 1 of the Federal Employers' Liability Act (45 U. S. C. § 51) because he was also survived by two sisters and a nephew, the son of a deceased brother, who were in no way dependent upon him and suffered no pecuniary loss by his death and were thereby disqualified as beneficiaries under the Act.

2. In reversing the judgment of the District Court and dismissing the complaint.

Reasons Relied on for the Allowance of the Writ

The decision of the Circuit Court of Appeals for the Second Circuit, interpreting and applying Section 1 of the Federal Employers' Liability Act (45 U. S. C. § 51) and holding that the nearest dependent kin of a deceased employee may not recover damages for his death when nearer, but non-dependent, kin survive, raises an important question of federal law which has not been, but should be, settled by this Court.

- (a) **The question is important and should be settled by this Court because of the importance of the federal statute and of the provision thereof involved herein.**

This Court has not decided the important question of federal law raised by the decision of the Circuit Court of Appeals: Whether, under the Federal Employers' Liability Act, on the death of a railroad employee, the survival of a nearer relative, who is disqualified as a beneficiary because he was in no way dependent upon the de-

ceased nor suffered pecuniary loss by reason of his death, deprives the relative next in degree of kinship, who is solely dependent upon the deceased and is the nearest dependent relative, of the right to recover, and thus leaves no enforceable cause of action.

The question involved is an important question of federal law. It deals with the interpretation of a section of the Federal Employers' Liability Act under which there is much litigation both in the federal courts and state courts.

There is also involved the question whether the Federal Employers' Liability Act is to be enforced in conformity with the principle applicable to death actions in which the right to recover is based upon dependency or pecuniary loss or other qualification: that upon disqualification of a possible beneficiary because he was not dependent or suffered no pecuniary loss or is otherwise disqualified, he is disregarded, and one less closely related, who is dependent and suffers pecuniary loss by reason of the death or is not subject to other disqualification, is entitled to recover. This principle was decisive in the following cases:

Notti v. Great Northern Ry. Co., 110 Mont. 464; 104 Pac. 2d, 7. Action under Federal Employers' Liability Act.

Missouri, K. & T. Ry. Co. v. Canada, 130 Okla. 171; 265 Pac. 1045; 59 A. L. R. 743.

McFadden v. May, 325 Pa. 145; 189 Atl. 483.

Indianapolis & Cir. Traction Co. v. Thompson, 81 Ind. App. 498; 134 N. E., 514.

Pries v. Ashland Light & Co., 143 Wis. 606; 128 N. W. 281.

Lytle v. Southern Ry. Co., 152 So. Car. 161; 171 So. Car. 221. Certiorari Denied, 290 U. S. 645. Action under the Federal Employers' Liability Act.

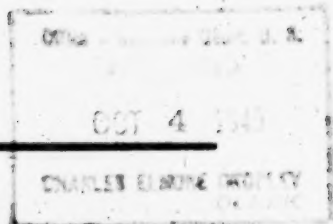
Roberts, Federal Liabilities of Carriers, 2d Ed. vol. 2, § 882, pp. 1729-1731.

25 *Corpus Juris Secundum*, p. 1112.

The question of federal law presented here is as important as that which served as the basis for granting the writ of certiorari in *Chicago, B. & Q. R. Co. v. Wells-Dickey Trust Co.*, 275 U. S. 161 (Certiorari granted, 271 U. S. 657), which also involved an interpretation of Section 1 of the Act. In that case the question was whether the survival of the deceased's mother, who was dependent upon him but who died before an administrator was appointed, barred an action on behalf of the sister. The question here is as important as the question considered by this Court in *Gulf, Colo. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, although in that case the question was before this Court on writ of error before enactment of the limitation upon writs of error to this Court. In that case this Court decided that a child of a deceased railroad employee could not recover under the Federal Employers' Liability Act when there was "neither allegation nor evidence" that she was "in any way dependent upon the decedent, nor that she had any reasonable expectation of any pecuniary benefit as a result of the continuance of his life".

The trial court held that, inasmuch as this Court had decided that only a dependent relative, or one who has suffered pecuniary loss by the death of the deceased, may recover under the Act (citing *Gulf, Colo. & S. F. R. Co. v. McGinnis*, 228 U. S. 173), the survival of a nearer non-dependent relative, who could not qualify as a beneficiary, should be disregarded and the nearest dependent relative permitted to recover.

Petitioner contended before the Circuit Court of Appeals that it was the intent of Congress in enacting the Federal Employers' Liability Act to provide for the nearest dependent kin of a deceased railroad employee; that, as this Court has held even in the case of a widow, children or parents, dependency or reasonable expectancy of pecuniary loss was a prerequisite to qualification as a beneficiary under the Act (*Gulf, Colo. & S. F. R. Co. v. McGinnis*, 228 U. S. 173; *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59); that in determining the right to recover, persons who



Supreme Court of the United States

OCTOBER TERM, 1945

No. 484

HELEN C. POFF, as Executrix of the Last Will and
Testament of John B. Welshans, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

MORRIS A. WAINGER,

Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1945

No.

**HELEN C. POFF, as Executrix of the Last Will and Testa-
ment of John B. Welshans, Deceased,**

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

The petitioner, Helen C. Poff, as Executrix of the Last Will and Testament of John B. Welshans, Deceased, respectfully shows to the Court:

The Opinions of the Courts Below

The opinion of the Circuit Court of Appeals has not yet been reported; it appears in full at pages 24 to 27 of the Record. The opinion of the District Court is reported in 57 Federal Supplement, at page 625, and appears in full at pages 13 to 16 of the Record.

were disqualified as beneficiaries should be disregarded and the nearest or "next" of dependent kin, who qualifies as beneficiary by reason of dependency is entitled to recover. Petitioner urged that such an interpretation of this provision of the Federal Employers' Liability Act was fully justified by the requirement that the Act "should be construed liberally to fulfill the purposes for which it was enacted" (*Jamison v. Encarnacion*, 281 U. S. 635, 640).

The Circuit Court of Appeals held that the test was: who was the next of kin, that is, the nearest relative? And it held that since the sisters and nephew were the nearest relatives and were not dependent upon the deceased, there could be no recovery for any one, and that the case lapsed for want of a qualified beneficiary, although petitioner was wholly dependent upon the deceased. It is petitioner's contention that the term "next of kin dependent upon such employee", as used in the Act, means next of dependent kin, and that under the circumstances here shown, petitioner, as the next of dependent kin, the nearest dependent relative, was entitled to recover.

Petitioner urged in the Circuit Court of Appeals that cases in which resort is had to a State law to establish relationship between a claimant and the deceased are not applicable here, because it is not necessary to determine who is "next of kin" in the sense of who is the *nearest relative who takes under the Pennsylvania intestate laws*. Petitioner concedes that if that were the only test, there are nearer relatives. However, petitioner urged that the question under the Act is: Who is the nearest dependent relative? It is conceded that petitioner is the *nearest dependent relative*. Resort is had to state law when it is necessary to determine whether the person claiming is "kin" at all or who is closer kin as between two or more relatives. As pointed out by the trial court (R. 15), this occurs, for example, in cases where the question to be determined is whether an illegitimate child is "kin" or "next of kin" of his parents or of his parents' legitimate children. That was the nature of the question which had to be determined in *Seaboard Air Line Ry. v. Kenney, Adm'r*, 240 U. S. 489.

It was held in that case that such a question is governed by state law. Petitioner urged that that does not mean that state law as to who is "kin" or "next of kin", or who is the nearest relative entitled to take a deceased's intestate estate, controls her right to recovery here. For here there is no question that the person claiming is "kin" and that she is nearest dependent "kin" or next of dependent kin. It follows that she is "next of kin dependent", as provided in the Act.

It was not disputed that had the sisters and nephew not survived, petitioner would have been entitled to recover. Their survival without a cause of action in their favor, because they were not dependent and because they suffered no pecuniary loss, is, for the purpose of the Federal Employers' Liability Act, in effect, the same as though they had not survived, and plaintiff should be permitted to recover. The Circuit Court of Appeals stated that it seems "incredible" (R. 27) that the statute should provide for a more remote dependent relative when a nearer non-dependent relative survives, because this Court has held in cases of the survival of a nearer relative who is entitled to recover only a small amount, a more distant relative of greater dependency, who would otherwise be entitled to substantial damages, cannot recover. However, this Court's decisions, which the Circuit Court of Appeals cited, proceed on the principle that when the cause of action has vested in a qualified beneficiary capable of taking in accordance with specific provision of the statute, the more remote relative cannot recover. This was the situation in *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, where the widow had lived apart from her husband but was held to have suffered pecuniary loss by his death, and therefore disqualified the more remotely related mother; in *Taylor v. Taylor*, 232 U. S. 363, where survival of a dependent widow was held to preclude recovery by the father; and in *St. Louis & S. F. R. Co. v. Scale*, 229 U. S. 156, 162, where survival of a widow prevented recovery by the parents. In each of these cases, the cause of action vested upon the death of the decedent for the benefit of a surviving relative

qualified to recover, thereby disqualifying more remote relatives. In the case at bar there was no vesting of the cause of action in a nearer qualified relative.

The Circuit Court of Appeals was in error in stating that a child independently wealthy would get "something, though little" under the Act (R. 26). The contrary follows from this Court's decision in *Gulf, Colo. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, that an adult child not dependent upon the deceased parent cannot recover under the Act.

The fact that the statute is not sufficiently broad to permit recovery by a more remote dependent relative when the nearer qualified relative is entitled to recover only a small amount, or dies before the suit is instituted, which the Circuit Court of Appeals gives as a reason for its decision (R. 26), seems to petitioner to constitute no justification for extending the injustice by holding that, where the nearer relative gets and can get nothing, and when no cause of action has vested in him under the Act, the next and totally dependent kin must also be excluded and the cause of action fail.

Nor are the provisions of Lord Campbell's Act, referred to by the Circuit Court of Appeals (R. 25), decisive. For under death statutes modeled on Lord Campbell's Act the recovery is usually for the benefit of the next of kin in the proportion in which they share unbequeathed assets of the deceased, and the question of dependency is not the qualifying factor. In this respect, the provision of the Federal Employers' Liability Act under consideration here is different, because under the circumstances of this case dependency is the criterion for qualification as a beneficiary.

- (b) The question is important and should be settled by this Court because decisions of highest appellate State courts, which have concurrent non-removable jurisdiction of cases under the Act, are in conflict with the decision of the Circuit Court of Appeals in this case.

The decision of the Circuit Court is in conflict with decisions of highest state appellate courts in interpreting this

section of the Act (*Notti v. Great Northern Ry. Co.*, 110 Mont. 464; *Little v. Southern Ry. Co.*, 152 So. Car. 161; 171 So. Car. 221, certiorari denied, 290 U. S. 645). Although such conflict does not constitute a conflict on a question of local law, the conflict between the decision of the Circuit Court of Appeals herein and the decisions of the state courts on this question of federal law is of importance in the enforcement of the Act by both federal courts and state courts and should be authoritatively settled by this Court to resolve the conflict, in view of the concurrent non-removable jurisdiction of state courts in cases under the statute (Federal Employers' Liability Act, §6; 45 U. S. C., §56).^{*} There are no other federal court decisions on the question presented herein.

The Supreme Court of Montana has held, in an action under the Federal Employers' Liability Act, that survival of a nearer non-dependent relative does not bar recovery by a more remote dependent relative.

Notti v. Great Northern Ry. Co., 110 Mont. 464; 104 Pac. 2d, 7.

The same principle is enunciated by *Roberts, Federal Liabilities of Carriers*, 2d Ed., vol. 2, §882, pp. 1729-1731.

The principle that where, under a death statute, dependency or pecuniary loss is essential to qualify a beneficiary, dependent relatives in a deferred class may take if those surviving in the preferred class suffer no pecuniary loss, governed the following cases under state death statutes:

Missouri, K. & T. Ry. Co. v. Canada, 130 Okla. 171; 265 Pac. 1045; 59 A. L. R. 743.

McFadden v. May, 325 Pa. 145; 189 Atl. 483.

Indianapolis & Cin. Traction Co. v. Thompson, 81 Ind. App. 498; 134 N. E. 514.

^{*}"The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States" (45 U. S. C., §56).

The principle is also stated in *25 Corpus Juris Secundum*, p. 1112.

Support for this principle is also found in the similar principle, that whenever under a death statute a nearer relative is disqualified for other reasons than dependency, a more remote relative not so disqualified may recover, even though, had there been no disqualification of the nearer relative, the more remote one could not have recovered. This principle was followed in an action under the *Federal Employers' Liability Act* in *Lytle v. Southern Ry. Co.*, 152 So. Car. 161; 171 So. Car. 221; certiorari denied, 290 U. S. 645, where the widow was disqualified, and the mother, who was more remotely related, was allowed to recover. It was also followed in *Pries v. Ashland Lt. &c. Co.*, 143 Wis. 606; 128 N. W. 281, where the parents of the deceased, being aliens, could not recover, and the sister, more remotely related, was permitted to recover.

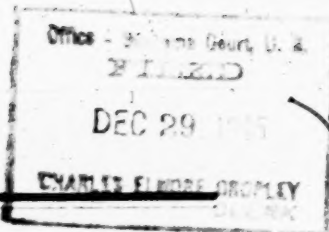
Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals, No. 351, Helen C. Poff, as Executrix of the Last Will and Testament of John B. Welshans, plaintiff-appellee, against The Pennsylvania Railroad Company, defendant-appellant, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reviewed by this Court, and for such further relief as to the Court may seem proper.

HELEN C. POFF, as Executrix of the
Last Will and Testament of John
B. Welshans, Deceased, Petitioner.

By MORRIS A. WAINGER,
Counsel for Petitioner.

October 3, 1945.

FILE COPY



Supreme Court of the United States

October Term, 1945

No. 484

HELEN C. POFF, as Executrix of the Last Will and
Testament of John B. Welshans, Deceased,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

MORRIS A. WAINGER,
Counsel for Petitioner.

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Supreme Court of the United States

October Term, 1945

No. 484

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vs.

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BRIEF FOR PETITIONER

The Opinions of the Courts Below

The opinion of the Circuit Court of Appeals is reported at 150 Fed. 2d 902 and appears in full at pages 14 to 17 of the Record.

The opinion of the District Court is reported at 57 Fed. Supp. 625 and appears in full at pages 8 to 10 of the Record.

Jurisdiction

This Court granted a writ of certiorari herein on November 13, 1945 (R. 19).

Statement of the Case

This is an action at law brought in the United States District Court for the Eastern District of New York by Helen C. Poff, as Executrix of the Last Will and Testament of John B. Welshans, Deceased, the petitioner herein, against The Pennsylvania Railroad Company, the respondent herein, under the Federal Employers' Liability Act (45 U. S. C., §§ 51-60) to recover damages for the death of the deceased, a railroad engineer, who was killed while engaged in interstate commerce under circumstances which respondent admitted on the trial constituted negligence chargeable to it (R. 6). The trial was before a jury which rendered a verdict for petitioner in the sum of \$8,500, on which judgment for \$8,575.63 was entered in the District Court (R. 10-11). An appeal from said judgment was taken by respondent to the United States Circuit Court of Appeals for the Second Circuit (R. 11-12), which reversed the judgment of the District Court and dismissed the complaint (R. 17, 18). The judgment of the Circuit Court of Appeals was entered herein on July 9, 1945 (R. 18). Petition for a writ of certiorari was filed in this Court on October 4, 1945, and said petition was granted on November 13, 1945 (R. 19).

Deceased left him surviving petitioner, his widowed first cousin, who was a member of his household and wholly dependent upon him for support; she had received her entire support from him for five and one-half years before his death (R. 6-7). Two sisters and a nephew, a son of a deceased brother, who were in no way dependent upon him, also survived the deceased (R. 6). No widow, children nor parents survived him (R. 6). Respondent does not contest the jury's finding that petitioner was dependent upon deceased (R. 7).

The sole question involved herein is whether the petitioner is entitled to recover under the provisions of Sec.

tion 1 of the Federal Employers' Liability Act (45 U. S. C., § 51) that in case of the death of an employee the carrier shall be liable

"to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee * * *"

The District Court held that since the petitioner was the nearest dependent kin of the deceased, she was entitled to recover under the Act (R. 8-10). *Poff v. Penna. R. R. Co.*, 57 Fed. Supp. 625.

The Circuit Court of Appeals decided that petitioner was not entitled to recover under this provision of the Act because nearer relatives survived the deceased, although they were in no way dependent upon him and although petitioner was the nearest surviving dependent relative (R. 14-17). *Poff v. Penna. R. R. Co.*, 150 Fed. 2d 902.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that petitioner, deceased's first cousin, who was wholly dependent upon him for support, and who was his nearest dependent kin, was not entitled to recover damages for his death under Section 1 of the Federal Employers' Liability Act (45 U. S. C., § 51) because he was also survived by two sisters and a nephew, the son of a deceased brother, who were in no way dependent upon him and suffered no pecuniary loss by his death and were thereby disqualified as beneficiaries under the Act.

2. The Circuit Court of Appeals erred in reversing the judgment of the District Court and dismissing the complaint.

Summary of Argument

Petitioner, as deceased's nearest surviving dependent relative, is entitled to recover damages for his death under the Federal Employers' Liability Act, and the Circuit Court of Appeals erred in holding to the contrary and dismissing her complaint.

I

Since damages for death under the Federal Employers' Liability Act are recoverable only by relatives who were dependent upon deceased or suffered pecuniary loss by his death, the nearest surviving dependent relative is entitled to recover, and the survival of nearer non-dependent relatives is not a bar to such recovery.

II

Restriction of beneficiaries under the Act to the "next of kin" or nearest relatives existing at the time of death would subject such recovery to the varying provisions of State statutes of descent and distribution. This would be contrary to the intent of Congress as disclosed by its rejection of proposals to make such State statutes applicable.

III

The decision of the Circuit Court of Appeals is contrary to the requirement that the Act be construed liberally.

ARGUMENT

Petitioner, as deceased's nearest surviving dependent relative, is entitled to recover damages for his death under the Federal Employers' Liability Act, and the Circuit Court of Appeals erred in holding to the contrary and dismissing her complaint.

I

Since damages for death under the Federal Employers' Liability Act are recoverable only by relatives who were dependent upon deceased or suffered pecuniary loss by his death, the nearest surviving dependent relative is entitled to recover, and the survival of nearer non-dependent relatives is not a bar to such recovery.

The relevant provision of Section 1 of the Federal Employers' Liability Act, which is involved herein, provides that in the case of the death of an employee the common carrier by railroad shall be liable in damages to his personal representative

"for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee"
(45 U. S. C., § 51).

The deceased employee in the case at bar left him surviving no widow, children or parents. He left him surviving, as his nearest relatives, two sisters and a nephew, the son of a deceased brother, who were in no way dependent upon him for support, and the petitioner, his widowed first cousin, next in degree among his surviving relatives, who was wholly dependent upon him.

The two sisters and nephew were not qualified beneficiaries under the Act because they were in no way dependent upon the deceased. *Gulf, C. & S. F. Ry. Co. v.*

McGinnis, 228 U. S. 173; *Michigan Central R. Co. v. Freedland*, 227 U. S. 59. It is well settled by the cases last cited that recovery in an action for damages for death under the Federal Employers' Liability Act may be had for the benefit of the relatives named in the Act only if they were dependent upon the employee or sustained pecuniary loss by his death. In the case of a widow and minor children, there may be a presumption from the relationship that such dependence exists or that pecuniary loss has been sustained.

The Circuit Court of Appeals held that the mere existence of the nearer relatives, even though they could not be beneficiaries under the Act, barred recovery by the petitioner, who was the nearest dependent relative, and, as petitioner claims, the next of kin dependent or next of dependent kin. The ruling of the Circuit Court of Appeals, in accordance with the contention and argument of the respondent, was to the effect that the Pennsylvania law of descent and distribution controls. Under that law the sisters and nephew would take decedent's estate, if he had died intestate, to the exclusion of the first cousin.

Petitioner urges that these provisions of the Pennsylvania law are not controlling. Under that law distribution is not based on dependence, whereas the right to recover herein is governed by the Federal Employers' Liability Act, which makes dependence the qualification for beneficiaries thereunder, and not by any State statute of descent and distribution. The purpose of the Federal Act is to provide for the dependent relatives or kin of a deceased employee who have lost their support or suffered pecuniary loss by reason of his death.

The purpose of the Act, to provide for the dependent relatives of a deceased railroad worker, would be defeated in every case in which there is a dependent relative and a non-dependent closer relative also survives if the survival of the latter were to constitute a bar to recovery by the dependent relative. The purpose of the Act can be effec-

tuated only by authorizing recovery for the benefit of the nearest relative who qualifies by reason of dependence or pecuniary loss and disregarding any nearer relative who does not so qualify.

It has been held that under the Federal Employers' Liability Act recovery may be had by a *dependent* relative, although there were also surviving nearer relatives who were not dependent upon the employee ~~or did~~ not sustain any pecuniary loss in his death. The situation is then treated as though no nearer relative survived.

Lytle v. Southern Ry. Co., 152 So. Car. 161; 171 So. Car. 221; *certiorari denied*, 290 U. S. 645.

Notti v. Great Northern Ry. Co., 110 Mont. 464.

Roberts, Federal Liabilities of Carriers, 2d Ed., Vol. 2, § 882, pp. 1729-1731.

In *Lytle v. Southern Ry. Co.*, *supra*, it was held that a widow, who had left the deceased and lived in adultery, was not qualified as a beneficiary under the Federal Employers' Liability Act, presumably because she had not suffered pecuniary loss by his death, and the mother of the deceased, who was in a deferred class under the Act and would not have been entitled to recover if the widow were entitled, was allowed to recover. The Court treated the unfaithful wife as though she was not the widow of the deceased. *Certiorari* was denied by this Court.

In *Notti v. Great Northern Ry. Co.*, *supra*, it was held by the Supreme Court of Montana that a mother who was dependent upon the deceased was entitled to recover under the Federal Employers' Liability Act despite the survival of two adult sons of the deceased who were not dependent upon him. There, as here, the railroad company contended that since there were surviving nearer relatives, who were in a preferred class under the Act the mother could not recover. Basing its decision upon the decisions of this

Court that a beneficiary under the Act can recover only if he sustained pecuniary loss or was dependent, and citing *Roberts, Federal Liabilities of Carriers, supra*, the Court held that, in the absence of a qualified beneficiary among the surviving nearer relatives, they will be disregarded, and the cause of action will lie for the benefit of the more distant relative who qualifies by reason of his dependence or pecuniary loss.

Roberts (Federal Liabilities of Carriers, 2d Ed., Vol. 2, § 882, pp. 1729-1931) states that as a necessary result of this Court's decisions that only relatives suffering pecuniary loss may recover,

"no right of action is created for the benefit of any of the enumerated classes of beneficiaries unless there lives, at the time of the employee's death, a dependent relative of that class. In the absence of such a qualified taker on the contrary, that class is to be disregarded, and a cause of action will arise for the benefit of, and will vest in, the class next in rank represented by a qualified beneficiary."

The same principle has been applied in death actions under State statutes, in which recovery is based on dependence or pecuniary loss. In such cases it has been held that persons in a deferred class may take if those surviving in the preferred class suffered no pecuniary loss.

Missouri, K. & T. Ry. Co. v. Canada, 130 Okla. 171.
Indianapolis & Cin. Traction Co. v. Thompson, 81
 Ind. App. 498.
 25 *Corpus Juris Secundum*, p. 1112.

In *Missouri, K. & T. Ry. Co. v. Canada, supra*, the action was under the Oklahoma death act by the husband to recover damages for the death of his wife, who left her surviving, in addition to the husband, "three adult married and independent children". The Oklahoma statute placed

the surviving husband in a deferred class in comparison with the surviving children, who would be exclusively entitled to the damages if they qualified as beneficiaries. The Court found that the adult children could not qualify as beneficiaries because they sustained no pecuniary loss and held that they "did not exist then in a legal sense" (130 Okla. at 173). Recovery was allowed by the husband, who was held to stand "in no worse condition than if the decedent had left no children surviving her" (p. 173).

In *Indianapolis & Cin. Traction Co. v. Thompson, supra*, deceased was survived by her husband and parents. The husband had suffered no pecuniary loss because he had lived apart from the deceased. Had he qualified as beneficiary the parents would not have been entitled to recover. Since he suffered no pecuniary loss it was held that the parents, who were in a deferred class in relation to the husband, were entitled to recover.

Pries v. Ashland Light & Co., 143 Wis. 606, illustrates a similar principle. Under the Wisconsin death statute non-resident aliens were held not entitled to recover. In the case cited decedent left him surviving a father and mother, who were non-resident aliens, and two sisters, who were not aliens. If the parents could have qualified as beneficiaries the sisters would have been excluded from recovery. The Court held that the survival of the parents without the right to recover did not deprive the sisters of that right.

In the case at bar the Circuit Court of Appeals based its rejection of the principle followed in the cases and by the authorities we have cited upon the decisions of this Court (*New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367; *Taylor v. Taylor*, 232 U. S. 363; *St. Louis & S. F. R. Co. v. Seale*, 229 U. S. 156, 162) which held that where a qualified beneficiary survived and became vested with the right to recover, a dependent relative in a deferred class

could not recover although the nearer relative was entitled to recover only a small amount by way of damages (R. 16-17). However, these decisions of this Court proceed on the principle that when the cause of action has vested in a *qualified* beneficiary capable of taking in accordance with the provision of the statute the more remote relative cannot recover. These cases do not impair the principle urged by petitioner. In each of these cases the more distant relative was excluded because a nearer *dependent* relative or one who suffered pecuniary loss survived, even though the actual damage sustained by latter was not large. The survival of a *dependent* relative vests the cause of action in him *exclusively* under the Act, irrespective of the amount of damages he is entitled to recover. The fact that such damages are small does not change the principle that when a cause of action has once vested in one dependent relative, none remains in favor of another who is more remotely related to the deceased. As this Court said in *Chicago, B. & Q. R. Co. v. Wells-Dickey Trust Co.*, 275 U. S. 161 at 163:

"The cause of action accrues at the death. *Reading Co. v. Koons*, 271 U. S. 58. When it accrues there is an immediate, final and absolute vesting; and the vesting is in that one of several possible beneficiaries who, according to the express provision of the statute, is declared entitled to be compensated."

That is not the situation in the case at bar. Here there was no vesting of any cause of action, with damages large or small, in any dependent relative more closely related to the deceased than the petitioner. The case at bar is, therefore, broadly and decisively distinguishable from these cases.

The fact that the statute is not sufficiently broad to permit recovery by a dependent relative when a nearer qualified relative is entitled to recover only a small amount seems to petitioner to constitute no justification for extend-

ing the injustice by holding that where the nearer relative gets and can get nothing, and when no cause of action has vested in him under the Act, the next and totally dependent kin must also be excluded and the entire cause of action fail.

Petitioner's right to recover under the Act would not be disputed if the deceased had left him surviving no sister and nephew. The authorities we have cited hold that petitioner's right to recover as a dependent relative is unaffected by the survival of closer relatives who are not entitled to recover because they were not dependent upon the deceased and suffered no pecuniary loss by his death. These authorities hold that since only a dependent relative may recover under the Act, a surviving relative who is not dependent is disregarded, as though he had not survived.

The principle thus enunciated is in accord with the terms of the statute and the obvious purpose for which it was enacted: to provide for the nearest relatives of a deceased railroad employee who suffer pecuniary loss or loss of support by reason of the death of the employee through the negligence of the railroad employer while both are engaged in interstate commerce. The basis upon which a relative qualifies as beneficiary is dependence or pecuniary loss, whether the next of kin be spouse, children, parents or others farther removed. The nearest dependent relative has the right to recover.

The interpretation of the Act by the Circuit Court of Appeals would result in the complete failure to carry out the beneficent purposes of the law in the case at bar, since it would result in the forfeiture or lapse of the cause of action, based on conceded negligence, for the benefit of a relative wholly dependent upon the deceased when there are no closer relatives who were dependent upon him or suffered pecuniary loss by his death. Petitioner respectfully submits that such a result should not be permitted unless the statute, in specific and indisputable terms, commands it.

Restriction of beneficiaries under the Act to the "next of kin", or nearest relatives existing at the time of death, would subject recovery to the varying provisions of State statutes of descent and distribution. This would be contrary to the intent of Congress as disclosed by its rejection of proposals to make such State statutes applicable.

The Circuit Court of Appeals has held that recovery under the Act is limited to the next of kin of a deceased worker who are in "existence" at the time of decedent's death (R. 17), that is, to his nearest surviving relatives, and if none of these is dependent upon deceased, there can be no recovery for a dependent relative or kin next in degree of kinship. This would limit recovery to those who would inherit or take the intestate estate of the deceased under State law.

Petitioner urges that not only the terms of the statute and its purpose, but also the proceedings in Congress during its consideration, indicate that such limitation is contrary to the intent of Congress. The adoption by Congress of specially designated beneficiaries and the rejection of all proposals that beneficiaries should be the persons who are entitled to recover in similar actions under State law, or who are entitled to share in a decedent's estate under State laws of descent and distribution, is persuasive indication that Congress intended that recovery be not limited according to State statutes.

The distinction must be noted between the provision of the Federal Act as to the identity and qualifications of beneficiaries, and the resort to State law to ascertain whether a person is "next of kin" or "kin" at all of the deceased. In the case at bar it is not necessary to determine who is "next of kin", in the sense of who is the nearest relative entitled under the Pennsylvania statute of descent

and distribution. Petitioner concedes that there are nearer relatives who would constitute "next of kin" under the Pennsylvania statute. However, petitioner urges that under the Act it is necessary to ascertain who is the nearest dependent relative. It is conceded that petitioner is the nearest dependent relative. Resort is had to State law only when it is necessary to determine whether the person claiming is "kin" at all, or who is closer of kin as between two or more relatives. As pointed out by the District Court (R. 9), this occurs, for example, in cases where the question to be determined is whether an illegitimate child is "kin" or "next of kin" of his parents or of his parents' legitimate children. That was the nature of the question which had to be determined in *Seaboard Air Line Ry. Co. v. Kenney*, 240 U. S. 489. It was held in that case that such a question is governed by State law. Petitioner urges that that does not mean that State law as to who is "kin" or "next of kin", or who is the nearest relative entitled to take a deceased's intestate estate, controls her right to recovery here. For here there is no question that the person claiming is "kin" and that she is nearest dependent kin or next of dependent kin. Petitioner urges that it follows that she is "next of kin dependent", as provided in the Act.

The intent of Congress to provide only for dependent relatives and for the nearest dependent relatives, without limitation to the nearest surviving relative, is indicated by the action taken during consideration of the bills which became the present Federal Employers' Liability Act: The Act of June 11, 1906, 34 Stat. 232; the First Employers' Liability Act (which was held unconstitutional because it embraced intrastate employment, *First Employers' Liability Cases*, 207 U. S. 463); the Act of April 22, 1908, 35 Stat. 65, the original of the present Act; and the Act of April 5, 1910, 36 Stat. 291, which added Section 9 to the Act, providing for the survival of the cause of action of the injured employee for the benefit of the

same beneficiaries enumerated in Section 1. Congress rejected provisions in the original bills which would have limited recovery to "heirs at law",¹ and amendments which would have provided that the recovery should be "distributed as unbequeathed assets",² "in the order fixed by law in such state",³ "to be distributed under the law of the State or Territory in which such right of action accrues".⁴ The language by which the beneficiaries were designated in Section 1 of the Act of 1908 is substantially the same as in the Act of 1906 and was exactly the same as in the Act of 1910.⁵

¹ H. R. 239, 59th Cong. 1st Sess., which became the 1906 Act, provided that recovery should be for the "heirs at law" of the deceased. The House Committee on Interstate and Foreign Commerce substituted "for the benefit of his widow and children, if any, if none, then for his next of kin dependent upon him" (House Report No. 2335, 59th Cong. 1st Sess., Cong. Rec., vol. 40, pt. 5, p. 4601). In the Senate, S. 156 and S. 1657 likewise provided for "heirs at law" (Cong. Rec., 59th Cong. 1st Sess., vol. 40, pt. 2, p. 1747), but when H. R. 239, as amended, was passed by the House, the Senate Interstate Commerce Committee reported that bill instead of the Senate bills (id., vol. 40, pt. 8, p. 7075, and Senate Report No. 3639, 59th Cong. 1st Sess.). The provision for "heirs at law" was thus specifically rejected by both Houses of Congress in favor of the present provision of the Act.

H. R. 20310, 60th Cong. 1st Sess., which became the 1908 Act, with the present provisions of Section 1 closely similar to the provisions of the Act of 1906, was passed after submission of House Report No. 1386, 60th Cong. 1st Sess., which contained summaries of the state laws on death by wrongful act with their varying provisions for beneficiaries and distribution of the recovery. The present provisions of Section 1 were adopted to avoid these varying state provisions, which were brought to the attention of Congress by this Report.

² Debates on H. R. 239, Cong. Record, 59th Cong. 1st Sess., vol. 40, pt. 5, p. 4601.

³ Debates on H. R. 17263, Cong. Record, 61st Cong. 2nd Sess., vol. 45, pt. 4, pp. 4045-4049, 4093-4097, 4122, 4123, 4124.

⁴ id., pp. 4048, 4123, 4124.

⁵ Act of June 11, 1906: "or in case of his death to his personal representatives for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him" (34 Stat. 232).

Act of April 22, 1908: "or in case of the death of such employee, to his personal representatives, for the benefit of the surviving widow.

The Senate debate on the proposed amendments to make State statutes of descent and distribution applicable to the recovery of damages under Section 9 of the Act, which resulted in the retention of the present language, clearly indicates that it was intended to make dependence the determining factor in the right to recovery and to reject any limitation of State law which might result in recovery on a different basis, and, as we have stated above, that the intent of Congress was to provide for those relatives who have been deprived of support by the death of the employee.⁶

or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee * * * (45 U. S. C., § 51).

Act of April 5, 1910: "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, * * * (45 U. S. C., § 59)."

⁶ Senator Sutherland (later Mr. Justice Sutherland of this Court) pointed out in opposing the amendments and supporting the present language of the Act:

"If the amendment is adopted the result may be that the action will survive for the benefit of some collateral heir or heirs who are in no manner dependent upon the deceased, and that some heir who is dependent upon the deceased will not be able to share in the recovery. * * *

The theory upon which all these laws of survivorship are drawn is that the person to whom the right of action is given is deprived of something; that he has been injured by the death. It is not like the case of distribution of an estate, which must go to the heirs, if there are any. We are conferring a right of action upon the survivors of the deceased because, by the death of the deceased, they have been deprived of something; in other words, the deceased has been contributing to the support of somebody—to the support of his widow, his children, or his parents. That is the theory upon which survival statutes are drawn. * * *

* * * The law which gives the right of survival of an action for the death of a person is upon the theory that the person to whom the right of action is given has been injured, has been deprived of support. Now this law confines it to the person

° It is, of course, true that the rejection of the proposed amendments and the insistence upon the present language of the statute were also motivated by the desire of Congress to make preferred provision for the widow, husband, children and parents, which some State statutes might not do. However, it is equally true that Congress, by rejecting these amendments and insisting on the language adopted, intended to avoid the effect of State statutes of descent and distribution which would have permitted recovery of damages on behalf of heirs or next of kin who were not dependent and which would have prevented recovery by a person who, in Senator Sutherland's words, "has been deprived of support", and to whose support "the deceased has been contributing". Congress intended, as Senator Piles stated, "that the cause of action survive for the benefit of the widow and children and those next dependent".

The decision of the Circuit Court of Appeals, which confines the recovery to the "next of kin" who would take

who is dependent upon the deceased." (Cong. Record, 61st Cong. 2nd Sess., vol. 45, pt. 4, p. 4047.)

"* * * the theory of the law is that the railroad company shall, so far as possible, recompense the persons who have been dependent upon him for his loss" (id., p. 4094).

Senator Piles, referring to the same proposed amendments and supporting the present language of the Act, said:

"I shall therefore insist that the cause of action survive for the benefit of the widow and children and those next dependent." (Cong. Record, 61st Cong. 2nd Sess., vol. 45, pt. 4, p. 4049.)

Senator Brown:

"This statute is for the benefit of those who are dependent on the injured employee. It is for the benefit of those who depend upon his labor for their sustenance."

"Statutes of this kind * * * are based upon the theory that care should be taken of those who are dependent upon the injured employee. *The dependency element in the statute is the gist of the statute; it is the purpose of the statute; * * **" (Cong. Record, 61st Cong. 2nd Sess., vol. 45, pt. 4, p. 4094.)

under the Pennsylvania statute of descent and distribution, prevents recovery in the case at bar by the person who "has been deprived of support" and to whose support "the deceased has been contributing" and by the person "next dependent".

It would seem that the insistence of Congress that State statutes of descent and distribution should not govern the distribution of the recovery in actions for death under the Federal Employers' Liability Act, in many of which dependence is not a requirement, indicates that Congress intended that dependence should be the controlling factor in qualifying a beneficiary,—certainly for those farther removed than the relatives specifically enumerated,—and that it did not intend, as some State statutes do, to allow recovery for the benefit of relatives who were not dependent. And since dependence was the controlling factor, it is submitted that it was not intended to limit recovery only to those entitled to share under the State law, the applicability of which was repeatedly rejected. The effect of the decision of the Circuit Court of Appeals in the case at bar would limit the right to recovery to the distributees under the State law, a limitation which Congress expressly rejected when it refused to adopt proposals to make State statutes of descent and distribution applicable.

The rejection by Congress of specific proposals contained in a bill is "significant". *Penna. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 198. The legislative history of a bill may be considered "in determining the meaning to be ascribed to an Act of Congress." *United States v. Dickerson*, 310 U. S. 554, 561-562. See also *United States v. American Trucking Associations*, 310 U. S. 534, 543-549; *Wright v. Vinton Branch*, 300 U. S. 440, 463-464.

III

The decision of the Circuit Court of Appeals is contrary to the requirement that the Act be construed liberally.

This Court has held that the Federal Employers' Liability Act "is to be construed liberally to fulfill the purpose for which it was enacted."

Jamison v. Encarnación, 281 U. S. 635, 640.

"The Federal Employers' Liability Act was designed to be applied liberally for the protection of railroad and other employees."

Lukon v. Penna. R. Co., 131 Fed. 2d 327, 329 (C. C. A. 3, 1942).

The liberal objectives of the Act are to be attained by its interpretation in accordance with the principles for which petitioner contends. The interpretation of the Circuit Court of Appeals is a narrow and not a liberal construction of the Act.

In enacting the Federal Employers' Liability Act it was the intent of Congress to provide for dependent relatives of railroad employees killed while engaged in interstate commerce. Under the liberal construction which is to be given to the Act, no dependent relative should be excluded, unless the language of the statute cannot reasonably be interpreted to include him. Under the rule enunciated by the Circuit Court of Appeals there can be no recovery in this case, in which liability is admitted and the proof is uncontradicted that the plaintiff was the *nearest dependent relative* and suffered very substantial pecuniary loss by reason of decedent's death. The support which she lost is as great as if she were the dependent widow, mother or sister of the deceased. The denial of recovery for this very substantial loss should not be imposed unless the statute expressly commands it. Petitioner urges that the language of the statute, its interpretation by other courts,

and the principles which govern the qualification of beneficiaries under similar laws, support plaintiff's right to recover herein.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court should be affirmed.

MORRIS A. WALGER,
Counsel for Petitioner.

December 20, 1945.

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CHARLES ELMORE DODDLEY

Supreme Court of the United States

OCTOBER TERM, 1945

No. 484

HELEN C. POFF, as Executrix of the Last Will and
Testament of John B. Welshans, Deceased,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Neither the statute nor the authorities cited by respondent justify its claim that recovery is limited only to the next of kin, the nearest surviving relatives, if dependent.

Respondent's argument resolves itself to the proposition that when Congress provided that recovery (if there be no widow or husband and children or parents) should be for the "next of kin dependent upon such employee", it intended to provide only for the nearest surviving relatives, if dependent, as though Congress had said that recovery was to be only for the "next of kin, if dependent upon such employee". This was the conclusion of the Circuit Court of Appeals. To support this narrow and illiberal construction, respondent cites several cases in which it was held that resort should be had to the appropriate State statute of descent and distribution to determine who are "next

of kin". In these cases, the question to be determined was whether the person claiming was "kin" at all. That was the situation in *Seaboard Air Line v. Kenney*, 240 U. S. 489 (Respondent's Brief, p. 3; Petitioner's Brief, p. 13), and *Hiser v. Davis*, 234 N. Y. 300, 305 (Respondent's Brief, pp. 3-4), where the question was whether an illegitimate child is "kin" at all within the terms "next of kin" and "children" as used in the Act. The situation was similar in *Blagge v. Balch*, 162 U. S. 439, 464, and *Buchanan v. Patterson*, 190 U. S. 352, 362 (Respondent's Brief, p. 3), where awards for French spoliation claims were payable to "next of kin". In none of these cases was the question to be determined affected by dependence upon the deceased individual whose "next of kin" were entitled to recover. In the case at bar, the question of the identity of the "next of kin" or whether petitioner is "kin" at all is not involved. Therefore, cases which merely hold that who are kin or next of kin is to be determined according to the State statutes of descent and distribution are irrelevant to the question before this Court in the case at bar. Certainly they do not support the proposition that recovery for the benefit of the "next of kin dependent upon such employee" means that recovery may be had only for the "next of kin, if dependent upon such employee" and limits recovery to the nearest surviving relative, if dependent, rather than to the nearest surviving dependent relative.

It seems unreasonable to petitioner to conclude that Congress intended by the language adopted, without specific provision to that effect, to limit recovery to the nearest surviving relatives, the next of kin, and to deny recovery to a dependent relative upon survival of a nearer non-dependent relative, when by the accident of survival or the varying provisions of state law next of kin may be, respectively, brothers and sisters, uncles and aunts, grandparents, cousins, or persons of more remote degree of consanguinity. It would seem that if such a limitation were intended, Congress would specifically have designated the relatives to take after parents, e.g., brothers and sisters and descendants

of deceased brothers and sisters. Petitioner believes that Congress intended to grant the right to recover to the nearest relative who may be dependent, irrespective of the survival of nearer non-dependent relatives, when it imposed the qualification of dependence upon those following the first two classes without also imposing the express limitation applicable to the first two classes—that a more remote relative takes only if there be “none” of the nearer relatives.

Kelley's Case, 222 Mass. 538 (Respondent's Brief, p. 7), is contrary to the weight of authority of the cases cited in petitioner's brief (pp. 7-9). It did not involve the Federal Employers' Liability Act, but interpreted the Massachusetts workmen's compensation law. The court itself, in that case, in effect admitted that its interpretation did not carry out “the object of the statute” which was “to provide in place of the wages of the deceased employee the means of sustenance for his widow and other dependents” (p. 541). The court's interpretation has been criticized as being contrary to the legislative intent:

“It must be said that it is inconceivable that the legislature had any such idea in mind in passing the statute” (L. R. A., 1917D, 159n).

Of course, no conclusion in favor of respondent should be drawn from *Lindgren v. U. S.*, 281 U. S. 38, in which recovery was denied to a nephew and niece who were not dependent, merely because, as respondent states, “there was no suggestion that their non-dependency would serve to qualify a more distant relative who might be dependent” (Respondent's Brief, p. 5). Neither existence of a more distant dependent relative nor the rights of such a relative were involved in that case.

An intent of Congress contrary to petitioner's claim is not indicated by the fact that some statutes make provision for recovery by “dependent relatives”. In the Federal Employers' Liability Act, Congress enacted a system of priorities by providing for recovery exclusively by the nearest relative who qualifies by reason of pecuniary loss or dependence. In the Death on the High Seas Act, 46 U. S. C., 761, 762 (Respondent's Brief, p. 6), Congress provided

an entirely different scheme: that all dependent relatives (kin) are entitled to recover in one action. Under that Act, a widow, children, parents and a cousin could all recover damages in the same action, and the recovery "shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person * * *" (46 U. S. C., § 762). The intent of Congress was different under the respective statutes. Inclusion of all relatives in one statute is not evidence of exclusion of the nearest dependent relative in the other.

Respondent's argument based on the existence of the more liberal statute is similar to the conclusion of the Circuit Court of Appeals that, because a dependent relative may be excluded under the Act upon the vesting of the cause of action in a prior qualified beneficiary entitled to only a small amount, it must be assumed that Congress never intended to provide for a more remote dependent relative when a closer non-dependent relative who is not entitled to recover also survives. Petitioner urges that just as the existence of a more liberal statute is not proof of the restriction urged by respondent here, so the fact that under conceivable conditions certain provisions of the law fail to afford desirable protection is no justification for an interpretation of another and different provision of the law to deny recovery merely to make it consistently harsh, when the language of the statute does not specifically require such interpretation.

Respectfully submitted,

MORRIS A. WAINGER,

Counsel for Petitioner.

January 8, 1946.

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CHARLES ELMORE GROFFLEY
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Supreme Court of the United States

OCTOBER TERM, 1945

No. 484

HELEN C. POFF, as Executrix of the Last Will and Testament of JOHN B. WELSHANS, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RAY ROOB ALLEN,

Counsel for Respondent.

(BURLINGHAM, VEEDER, CLARK & HUPPER)

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Statement

This case presents the question whether a recovery can be had under the Federal Employers' Liability Act (45 U. S. C. A. § 51) for the benefit of a dependent cousin of the decedent when decedent left nearer, non-dependent relatives (namely, sister and a nephew). It is conceded that under the statutes of Descent and Distribution of Pennsylvania, where decedent resided and where he was killed, the sisters and nephew were the sole next of kin in the sense that they would take to the exclusion of the cousin (Petitioner's Brief, p. 8).

The opinion of the Circuit Court of Appeals is reported at 150 F. 2nd 902.

POINTS

I. The decision of the Circuit Court of Appeals is in accord with the decisions of this Court; no novel question is presented.

The controversy turns upon the construction to be given to the expression "next of kin dependent upon such employee", for it is for the benefit of such person or persons that the statute gives a recovery where, as in this case, no spouse, children or parents survive.

Petitioner would construe the foregoing words as meaning "the nearest dependent relative" (Petitioner's Brief, p. 8).

Respondent claims that dependency merely conditions the right of the "next of kin" but plays no part in defining the "next of kin"; that the words "next of kin" are to be given their usual "legal" meaning, namely, those entitled to take under the state law. Such is the construction that this Court has put upon the words "next of kin" in the Federal Employers' Liability Act. In *Seaboard Air Line v. Kenney*, 240 U. S. 489, this Court said:

"Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law" (493-4).

Besides stating how the "next of kin" are to be ascertained, the *Seaboard* case states squarely that it is "the next of kin to whom a right of recovery is granted".

Following the *Seaboard* case, the New York Court of Appeals held in *Hiser v. Davis*, 234 N. Y. 300, 305, that the meaning of the word "children"—whether it includes illegitimates—likewise depends upon the state law.

The beneficiaries under the Federal Employers' Liability Act are the spouse and certain relatives, not collectively, but in the alternative, in a fixed order of priority. *C. B. & Q. R. R. Co. v. Wells-Dickey Trust Co., Adm.*, 275 U. S. 161, 163. The order of priority is determined by relationship. Dependency merely conditions the right of the "next of kin", once it has been determined, under the state law, who are the "next of kin". And failure of a class to establish pecuniary damages does not operate to pass the right to a succeeding class.

Thus, this Court has held that the fact that a widow survived, although she had deserted decedent and apparently could not show dependency or expectation, precluded a recovery for the benefit of decedent's dependent mother. *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367. In *Lindgren v. U. S.*, 281 U. S. 38, recovery was denied where the next of kin, a nephew and niece, were not dependent. There was no suggestion that their non-dependency would serve to qualify a more distant relative who might be dependent.

Petitioner argues that recovery under the statute is based upon dependency, and that for this reason if the "next of kin" is not dependent, he in effect should be treated as non-existent, with the right going to the next person in order of relationship, if that relative is depend-

ent; if not, then to the next, etc., until a dependent is reached.

As to this argument, the Circuit Court of Appeals said:

"The plaintiff relies chiefly upon the well-settled law that recovery by any of the persons named in the statute is limited to the pecuniary loss suffered. *Michigan Central R. Co. v. Freeland*, 227 U. S. 59; *Gulf, Colorado and Santa Fe R. Co. v. McGinnis*, 228 U. S. 173. However, the converse by no means follows: i. e. that all who suffer pecuniary loss by the death may recover. So much is certainly not true. No doubt, there would have been an intelligible purpose in so providing, but from Lord Campbell's Act forward that has never been the law" (R. 25).

Had Congress intended that in the absence of spouse, child and parent, the recovery should be for the benefit of dependent relatives, Congress would have so provided, as it did in the later Death on the High Seas Statute, 46 U. S. C. A. § 761. Instead of the words "next of kin", that statute uses the words "dependent relative". Similar words have been used in other death statutes, e.g. those involved in *Cole v. Mayne*, 122 Fed. 836, and *Baldwin v. Powell*, 294 N. Y. 130, 133.

The cases cited on page 6, petitioner's brief, may be readily distinguished. In *Missouri K. & T. Ry. Co. v. Canada*, 130 Okla. 171, 265 Pac. 1045—the authority cited by 25 C. J. Secundum, p. 1112—the decision turned on the fact that married adults were held not to be "children" within the meaning of the Oklahoma statute and, accordingly, the right of action vested in the next of kin, which was held to include a husband under Oklahoma law. In *Pries v. Ashland*, 143 Wis. 606, 128 N. W. 281, alien parents were held not to be within the intendment of the statute,

hence the right vested in a sister, since there was no one belonging to a prior class.

Lytle v. Southern Ry. Co., 152 S. C. 161, 171 S. C. 221, cert. den. 290 U. S. 645, turned on the fact that decedent's wife had deserted him without cause and was living in adultery with someone else: the Court considered the woman's status comparable to that of a divorced wife and that she was not a "widow" within the meaning of the statute. *Indianapolis, etc. Co. v. Thompson*, 81 Ind. App. 498; 134 N. E. 514, was similar, except that the deserting party was the husband.

McFadden v. May, 325 Pa. 145; 189 Atl. 483, involved merely the mechanics of suit. Beneficially, the child was in the first class, whether or not the father had any beneficial right.

Petitioner relies on a statement in 2 *Roberts, Federal Liability of Carriers* (2nd Ed.), Sec. 882, pp. 1729-31. Roberts cites as support for his view, the *Harris* case (*supra*), 247 U. S. 367. But that decision is contrary to Roberts' statement, since this Court held that the fact that a widow survived, although she had deserted her husband and could apparently not show dependency or expectation, precluded a recovery on behalf of a mother who had sustained pecuniary loss.

Almost the precise question was decided adversely to petitioner in *Kelley's* case, 222 Mass. 538. The pertinent statutory words were:

"next of kin who were wholly or partly dependent upon the earnings of the employee for support."

The fact that deceased left a non-dependent father was held to bar a dependent brother, who would have recovered had the father not survived.

Petitioner relies on *Notti v. Great Northern Ry. Co.*, 110 Mont. 464, 104 Pac. (2d) 7. There, the deceased left two adult sons and a dependent mother. Suit was by the administrator and the decision was on demurrer to the complaint. There being no spouse, the sons were in the first class, so that, as against demurrer, the administrator's suit was held to be maintainable, even though the sons could establish only nominal damages.

The dictum that recovery might be had for the mother was based on the passage from *Roberts, Federal Liability of Carriers*, which, as pointed out above, is unsupported by authority, and is contrary to this Court's decision in the *Harris* case (*supra*), 247 U. S. 367.

The correct rule was well stated in *In re Stone*, 173 N. C. 208 (writ dismissed, 245 U. S. 638), where the Court said:

"The Federal statute [the Employers' Liability Act], therefore, creates three classes, which are separate and distinct from the other. If there is any member of the first class, the other two are excluded. If there is none of the first class, but one or more of the second, then the third class will be excluded. If any member of the last class does not come under the provisions 'dependent upon such employee' . . . then such person is excluded from that class, and if such exclusion should apply to the whole of that class, then there can be no recovery."

Who are the third or last class? Clearly those recognized by the State statute as being the next of kin of the decedent at the time of his death—in the present case the sisters and nephew. Had such next of kin not survived decedent, others—in this case the cousin—would have been the next of kin. But that possibility does not result in the inclusion of the cousin in the third class. Since none of the members of the third class was dependent, then, as the *Stone* case holds, "there can be no recovery".

7

CONCLUSION

The petition for writ of *certiorari* should be denied.

RAY ROOD ALLEN,

Counsel for Respondent

(BURLINGHAM, VEEDER, CLARK & HUPPER)

New York, N. Y.,

October 25, 1945.

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 484

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ment of JOHN B. WELSHANS, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT

RAY, ROOD ALLEN,

Counsel for Respondent.

(BURLINGHAM, VEEDER, CLARK & HUPPER)

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Supreme Court of the United States

OCTOBER TERM, 1915

No. 484

HELEN C. POFF, as Executrix of the Last Will and Testament of JOHN B. WELSHANS, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT

Statement of the Case

This case presents the question whether recovery can be had under the Federal Employers' Liability Act (45 U. S. C., §51) for the benefit of a dependent cousin of the decedent, when the decedent left nearer non-dependent relatives, namely, two sisters and a nephew (son of a deceased sister) (R. 6).

The pertinent statutory words stating for whose benefit the Act gives a recovery in case of an employee's death are as follows:

"to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee * * *"

It will be seen that where the employee leaves no surviving spouse, children or parents—the situation in the case at bar,—the beneficiary under the Act is “the next of kin dependent upon such employee”.

It is conceded that under the Statutes of Descent and Distribution of Pennsylvania, where decedent resided and where he was killed (R. 5), the sisters and nephew were the sole next of kin, in the sense that they would take under the Pennsylvania Statute of Distribution to the complete exclusion of the cousin, on whose sole behalf this action is brought (Petitioner's Brief, p. 6).

A R G U M E N T

I. Decedent's cousin, for whose sole benefit this action is brought, does not fall within the category of those for whose benefit a right of recovery is given by the Federal Employers' Liability Act, since decedent's sisters and nephew were his “next of kin”, to the exclusion of the cousin.

Recognizing that decedent's sisters and nephew constitute his “next of kin” under the Pennsylvania statutes, to the complete exclusion of the cousin, petitioner argues that the Act should be construed as giving a right of recovery to “the nearest surviving relative” who is dependent upon decedent, notwithstanding that there are nearer surviving relatives who qualify as next of kin under the Pennsylvania Statute of Distribution (Petitioner's Brief, p. 5).

Respondent believes that dependency merely conditions the right of the “next of kin” (once they are ascertained), but plays no part in defining who are “next of kin”, or who can recover (if they can establish dependency).

Respondent contends that the words "next of kin" should be given their usual "legal" meaning, namely, those entitled to take under the state law. Such is the construction that this Court has put upon the words "next of kin" in the Federal Employers' Liability Act. In *Seaboard Air Line v. Kenney*, 240 U. S. 489, this Court said:

"Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law" (493-4).

The same construction has been placed upon the words where used in other Federal statutes. In *Blagge v. Balch*, 162 U. S. 439, which involved the construction of an Act of Congress granting awards for French spoliation claims to "next of kin" of the original sufferers, this Court said:

"And we are of the opinion that Congress * * * intended next of kin according to the statutes of distribution of the respective states of the domicile of the original sufferers" (464).

In accord, *Buchanan v. Patterson*, 190 U. S. 353, 362.

Besides stating how the "next of kin" are to be ascertained, the *Kenney* case (*supra*) states squarely that it is "the next of kin to whom a right of recovery is granted". There is no suggestion that any dependent relative who is not "next of kin", could ever have the benefit of the Act.

Following the *Kenney* case, the New York Court of Appeals held in *Hiser v. Davis*, 234 N. Y. 300, 305, that

the meaning of the word "children"—whether it includes illegitimates—likewise depends upon the state law.

The beneficiaries under the Federal Employers' Liability Act are the spouse and certain relatives, not collectively, but in the alternative, in a fixed order of priority. *C. B. & Q. R. R. Co. v. Wells-Dickey Trust Co., Adm.*, 275 U. S. 161, 163. The order of priority is determined by relationship, not by dependency.

In large part, Congress established the order of priority. In the first class, Congress placed "the surviving widow or husband and children". It is only in case no one of that class survives that recovery can be had for the benefit of the second class, namely, the "employee's parents". Only if no one survives from the first or second class can there be a recovery for the benefit of the third class, "the next of kin dependent upon such employee".

Congress, however, did not define who are "next of kin", with the result that, as this Court held in the *Kennen* case (*supra*), that question is to be determined by the appropriate state law.

Neither the words of the Act nor the decisions of this Court interpreting the Act, in any way support the view that the inability of persons of a prior class to establish pecuniary damages operates to pass the right to a succeeding class. The language of the Act makes non-survivorship of persons in the first class a condition to the right passing to the second class; likewise, the non-survivorship of persons in the second class, a condition to the right passing to the third class.

Consonant therewith, this Court held that the fact that a widow survived, although she had deserted decedent and apparently could not show dependency or expectation, pre-

cluded a recovery for the benefit of decedent's dependent mother. *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367. In *Lindgren v. U. S.*, 281 U. S. 38, recovery was denied where the next of kin, a nephew and niece, were not dependent. There was no suggestion that their non-dependency would serve to qualify a more distant relative who might be dependent.

Petitioner argues that because the next of kin must establish dependency and the widow or parent must establish some expectation, this establishes that the purpose of the Act is to provide for *dependent relatives* and that eligibility for recovery is based upon "dependence" and not "any State statute of descent and distribution" (Petitioner's Brief, p. 6). Petitioner argues that the Act should be construed as "disregarding any nearer relative who does not so [i. e., by being dependent] qualify" (Petitioner's Brief, p. 7). In other words, petitioner would treat a non-dependent relative as being a non-surviving relative, to the end that the right of recovery should pass down the line of relationship until it reaches some relative who is dependent.

To this argument, the Circuit Court of Appeals said:

"The plaintiff relies chiefly upon the well-settled law that recovery by any of the persons named in the statute is limited to the pecuniary loss suffered. *Michigan Central R. Co. v. Freeland*, 227 U. S. 59; *Gulf, Colorado and Santa Fe R. Co. v. McGinnis*, 228 U. S. 173. However, the converse by no means follows: i. e. that all who suffer pecuniary loss by the death may recover" (R. 25).

The Circuit Court of Appeals then cited various decisions of this Court inconsistent with the construction of the Act for which petitioner contends (R. 26).

Had Congress intended that in the absence of spouse, child and parent the recovery should be for the benefit of dependent relatives not necessarily "next of kin", Congress would have so provided, as it did in the later Death on the High Seas Act, 46 U. S. C. A. §761. Instead of the words "next of kin", that statute uses the words "dependent relative". Similar words have been used in other death statutes, e. g., those involved in *Cole v. Mayne*, 122 Fed. 836, and *Baldwin v. Powell*, 294 N. Y. 130, 133. Congress in the Act involved here, however, used the words "next of kin", not the word "relative".

The state court decisions cited by petitioner may be readily distinguished. In *Missouri, K. & T. Ry. Co. v. Canada*, 130 Okla. 171, 265 Pac. 1045—the authority cited by 25 C. J. *Secundum*, p. 1112—the decision turned on the fact that married adults were held not to be "children" within the meaning of the Oklahoma statute and, accordingly, the right of action vested in the next of kin, which was held to include a husband under Oklahoma law. In *Pries v. Ashland*, 143 Wis. 606, 128 N. W. 281, alien parents were held not to be within the intendment of the statute, hence the right vested in a sister, since there was no one belonging to a prior class.

Lytle v. Southern Ry. Co., 152 S. C. 161, 171 S. C. 221, cert. den. 290 U. S. 645, turned on the fact that decedent's wife had deserted him without cause and was living in adultery with someone else: the Court considered the woman's status comparable to that of a divorced wife and that she was not a "widow" within the meaning of the statute. *Indianapolis, etc. Co. v. Thompson*, 81 Ind. App. 498, 134 N. E. 514, was similar, except that the deserting party was the husband.

Petitioner relies on a statement in ² *Roberts, Federal Liability of Carriers* (2nd Ed.), Sec. 882, pp. 1729-31. Roberts cites as support for his view the *Harris* case (*supra*), 247 U. S. 367. But that decision is contrary to Roberts' statement, since this Court held that the fact that a widow survived, although she had deserted her husband and could apparently not show dependency or expectation, precluded a recovery on behalf of a mother who had sustained pecuniary loss.

In *Notti v. Great Northern Ry. Co.*, 110 Mont. 464, 104 Pac. (2d) 7, relied upon by petitioner, the deceased left two adult sons and a dependent mother. Suit was by the administrator and the decision was on demurrer to the complaint. There being no spouse, the sons were in the first class, so that, as against demurrer, the administrator's suit was held to be maintainable, even though only nominal damages might be provable.

The dictum that recovery might be had for the mother was based on the passage from *Roberts, Federal Liability of Carriers*, which, as pointed out above, is unsupported by authority, and is contrary to this Court's decision in the *Harris* case (*supra*), 247 U. S. 367.

Almost the precise question involved here was decided adversely to petitioner's contention in *Keller's case*, 222 Mass. 538. The pertinent statutory words there were:

"next of kin who were wholly or partly dependent upon the earnings of the employee for support."

The fact that deceased left a non-dependent father was held to bar a dependent brother, who would have recovered had the father not survived.

The correct rule was well stated in *In re Stone*, 173 N. C. 208 (writ dismissed, 245 U. S. 638), where the Court said:

"The Federal statute [the Employers' Liability Act], therefore, creates three classes, which are separate and distinct from the other. If there is any member of the first class, the other two are excluded. If there is none of the first class, but one or more of the second, then the third class will be excluded. If any member of the last class does not come under the provisions '~~dependent upon such employee~~' * * * then such person is excluded from that class, and if such exclusion should apply to the whole of that class, then there can be no recovery."

Who are the third or last class? Clearly those recognized by the State statute as being the next of kin of the decedent at the time of his death—in the present case the sisters and nephew. Had such next of kin not survived decedent, others—in this case the cousin—would have been the next of kin. But that *possibility* does not result in the inclusion of the cousin in the third class. Since none of the members of the third class was dependent, then, as the *Stone* case holds, "there can be no recovery".

II. The legislative history of the Act supports the Circuit Court of Appeals' construction: it discloses no intention that where no spouse, child or parent survives, relationship, no matter how remote, if coupled with dependency, will support a recovery.

As first introduced in the House, the 1906 bill (the forerunner of the present Act) provided that recovery should be for the benefit of the "heirs at law" of the deceased (Petitioner's Brief, p. 14). When the House Committee substituted as beneficiaries:

"his widow or children, if any, if none, then for his next of kin dependent upon him".

Congress made clear its intention that if a widow or children survived, the recovery should be entirely for their benefit regardless of the status of the widow or children under the state statutes of distribution. It was well known that under most statutes of distribution, a spouse shares in the other spouse's estate only to a limited extent. A brother might receive more than the widow.

Congress also dealt specifically in favor of parents, if no widow or child survived (Petitioner's Brief, p. 14, n. 5).

The changes made in the 1906 bill, carried over in substance into the 1908 Act, also made it clear that if no widow, children or parents survived, the right passed to the next of kin, but only if they were dependent on the deceased. The proposed amendment (Petitioner's Brief, p. 14) that the recovery should be distributed as "unbequeathed assets" would have had the same disadvantage as the use of the words "heirs at law"—i.e., from the standpoint of giving the widow and children full priority; also the additional disadvantage of making the recovery available to creditors.

It is apparent that what principally concerned Congress was that the recovery should go exclusively to the spouse and children, if any of that class survived; that if none survived, then the recovery should go exclusively to the employee's parents. If no one belonging to these special relationships should survive—relationships where the law ordinarily imposes an obligation of support—then the next of kin could recover if they were in fact dependent. There is no suggestion that the right of recovery should ever go beyond the class of "next of kin".

Petitioner concedes in substance that Congress was motivated by the foregoing considerations (Brief, p. 16), but

petitioner contends that Congress also intended to avoid the effect of state statutes of descent and distribution, in the determination of who might recover in the absence of any survivors of the first two classes. There is nothing in the debates in Congress which supports this view. The quotations from Senators Sutherland and others (Respondent's Brief, p. 15, n. 6) show that their concern related to the widow, children and parents, not to persons of more distant relationship. And, as shown in Point I, petitioner's contention is contrary to the decisions of this Court.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed, with costs.

RAY ROOD ALLEN,

Counsel for Respondent.

(BURLINGHAM, VEEDER, CLARK & HUPPER)

New York, N. Y.,

January, 1946.

SUPREME COURT OF THE UNITED STATES.

No. 484.—OCTOBER TERM, 1945.

Helen C. Poff, as Executrix of the
Last Will and Testament of John
B. Welshans, Deceased, Petitioner,
vs.

The Pennsylvania Railroad Company.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Second Circuit.

[February 25, 1946.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

Congress provided in the Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. § 51) that the carrier's liability in case of the death of an employee runs

"to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee."

The deceased, residing in Pennsylvania, was a railroad engineer employed by respondent and was killed while engaged in its service in interstate commerce. Respondent's negligence was conceded. The deceased left no widow, children, or parents. His nearest surviving relatives were two sisters and a nephew, none of whom was in any way financially dependent on him. But petitioner, who was his cousin, was a member of his household and wholly dependent on him for support. The District Court rendered judgment for petitioner, 57 F. Supp. 625. The Circuit Court of Appeals reversed, holding that petitioner was not entitled to recover since there were nearer relatives, though not dependent ones, who survived the deceased, 150 F. 2d 902. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question.

We assume without deciding that the Circuit Court of Appeals correctly concluded that members of the second or third class, irrespective of their need, are not entitled to recover if there survives a member of the prior class. Cf. *Notti v. Great Northern Ry. Co.*, 110 Mont. 464. The liability is not "to the several classes collectively" but in the alternative to one of the three classes. *Chicago, B. & Q. R. Co. v. Wells Dickey Trust Co.*, 275 U. S. 161.

163. Thus to an extent, at least, the order of priority is determined by relationship, not by dependency. See *New Orleans & N. R. Co. v. Harris*, 247 U. S. 367. Cf. *Lytle v. Southern Ry.*, 152 So. Car. 161. But the Circuit Court of Appeals went further and applied that principle to determine which members of the third class (next of kin) were entitled to recover. It said that since parents or grandchildren, dependent on the deceased, are left without remedy if a widow or child survives, Congress could not have meant to recognize remote members of the deceased's other kin, similarly situated. It read "next of kin dependent upon such employee" to mean "next of kin; if dependent upon such employee". Since the two sisters and nephew were the "next of kin" who would take to the exclusion of petitioner under Pennsylvania's law of descent and distribution¹ if the deceased died intestate, petitioner was barred here.

We read the statute differently.

It is clear that "next of kin" is determined by state law. *Seaboard Air Line Ry. v. Kenney*, 240 U. S. 489. State law governs whether it is necessary to determine if one relative is closer than another, or if a claimant falls within or without the class. But under this Act, unlike the state statutes of descent and distribution, a member of the third class must be not only next of kin but also dependent on the deceased in order to recover. The emphasis on dependency suggests that Congress granted the right of recovery to such next of kin as were dependent on the deceased. And that interpretation seems to us to be more in harmony with the Act than the construction adopted by the Circuit Court of Appeals.

We are not warranted in treating as an antecedent class the nearer next of kin who are not dependent. That would be to rewrite the statute. Congress has created three classes, not four or more. Yet to hold that the existence of nearer next of kin who are not dependent bars recovery by more remote next of kin who are dependent is to assume that the former constitute a preferred class. Congress, however, placed all next of kin in one class. To use dependency as the selective factor in determining which members of a particular class may recover is no innovation under this Act. For the Court held in *Gulf, C. & S. F. Ry. Co. v. McGinnis*, 228 U. S. 173, that in a suit brought by a widow as

¹ See 29 Purdon's Pa. Stats. Ann. §§ 62, 63, 66, 67.

administratrix for the benefit of herself and four children, a judgment in favor of an adult child who was married and resided with and was maintained by her husband would not be sustained in absence of a showing of pecuniary loss. Moreover, when Congress made the widow preferred over the parents and both the widow and parents preferred over the next of kin, it barred the deferred classes from recovering by creating a preferred class which could recover. Yet if respondent's theory is adopted, the nearer next of kin who are not dependent are treated as a preferred class not for the purpose of allowing them to recover but to defeat a recovery by all next of kin.² It may be true, as was the case in *Chicago, B. & Q. R. Co. v. Wells-Dickey Trust Co.*, *supra*, that the cause of action may be lost to the preferred class and to the deferred class as well. But that result, though possible, flows not from the nature of the preference but from such circumstances as the failure promptly to pursue the claim. Yet it would be a radical departure from the statutory scheme to do within the third class what Congress has not done between the classes and defeat all recovery by holding that the cause of action vested in one who could not under any circumstances sue. Under this Act deferment of a class is based on the existence of members of a preferred class to whom Congress has granted the right of recovery. We find no compulsion in the policy or language of the Act to adopt a more stringent interpretation when we come to determining what members of the third class may sue.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

²It is clear that the two sisters and the nephew, the nearest surviving relatives, could not recover. *Lindgren v. United States*, 281 U. S. 35.

Mr. Justice FRANKFURTER dissenting, with whom Mr. Justice BURTON concurs.


Congress might well have allowed recovery as a matter of course to any near relative of a railroad employee whose death was due to a carrier's negligence. Congress chose not to do so. Congress merely gave a right of action "to certain relatives dependent upon an employ e wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death." *Mich.*

Cent. R. R. v. Vreeland, 227 U. S. 59, 68; and see *Gulf, Colorado &c. Ry Co. v. McGinnis*, 228 U. S. 173, 175; *Garrett v. Louisville & Nashville R. R.*, 235 U. S. 308, 313. Congress might have extended the benefits of its legislation to any dependent relative by using a colloquial description such as "the nearest dependent surviving relative." It chose not to do that. On the contrary, it used the phrase "next of kin," a term of precise meaning in the law. In sum, Congress carefully limited the relatives eligible for compensation for an employee's death and strictly designated the basis of eligibility.¹

What Congress did was thus analyzed by the court below:

"Congress, which was willing to leave unremedied loss suffered by parents, or grandchildren, who might be totally dependent upon the deceased, could not have meant to recognize remote members of the deceased's other kin, similarly situated. The plaintiff's interpretation does not fulfill any rational purpose; it merely introduces an exception at the precise place where an exception is least to be desired or expected; it mutilates the statute, as much in its purpose as in its language. As in the case of the first two preferred classes, 'next of kin' is defined by its hereditary, not by its pecuniary, relation to the deceased; it means the next of kin as the law has always meant it; and dependency is only a selective factor, a condition upon recovery by any members of that class, as it is among members of the first two classes. The case is not therefore one in which Congress has failed to express its obvious purpose, and in which courts are free to supply the necessary omission; it is a case where—whatever that purpose—it certainly did not include what the plaintiff asserts." *Poff v. Pennsylvania R. R.*, 150 F. (2d) 902, 905.

I do not find a persuasive answer to this analysis and am therefore of opinion that the judgment below should be affirmed.


¹ "That every common carrier by railroad [in interstate and foreign commerce] shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death. . . ." 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. § 51.